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In the
Supreme Court of the United States

OCTOBER TERM, 1964 65

No. ~~1185~~ 158

EASTERN AIR LINES, INC. AND
NATIONAL AIRLINES INCORPORATED,
PETITIONERS,

v.

NORTHEAST AIRLINES, INC. AND
CIVIL AERONAUTICS BOARD,
RESPONDENTS.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR NORTHEAST AIRLINES, INC. IN OPPOSITION

Northeast Airlines, Inc., one of the respondents herein, respectfully submits the following in opposition to both

*This Brief is captioned according to the parties originally named by petitioners only because it is due to be filed before this Court acts on the motion, recently received by Northeast, praying that the Master Executive Council of Pilots of Northeast Airlines, Inc. and the International Association of Machinists be added as parties respondent. Northeast does not oppose that motion and agrees that those parties should have been named as respondents by petitioners (see footnote 6 *infra*.)

the Petition for a Writ of Certiorari filed May 19, 1965 and the proposed Amendment and Supplement to said Petition filed May 26, 1965:[1]

Questions Presented

The two questions which petitioners attempt to raise, both of which involve one interlocutory ruling of the court below in proceedings to review certain orders of the Civil Aeronautics Board and both of which are moot and hypothetical because the Board has since rescinded those orders and undertaken further hearings, are the following:

a. Whether the court below abused its discretion because that ruling, which granted an interlocutory motion, was made without argument on behalf of petitioners with respect to that motion, where petitioners did not timely move for intervention and never tendered any such argument, where the court did consider argument of petitioners to the Board on the same issue, and where petitioners' only interest in the Board's orders was that those orders would for the time being have eliminated one competitive carrier from some of petitioners' routes.

b. Whether the court below erred in ruling that, once the Board "opened the door to new data" and by "official notice" considered incomplete evidence, it must permit a party, upon timely request, to introduce further evidence in rebuttal or explanation of the matters as to which official notice was taken.

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[1] Despite many charges of "error" in petitioners' proposed Amendment and Supplement to Petition, that document does not even purport to present any new question. Accordingly, in this Brief the Petition and the proposed Amendment and Supplement are generally treated as if they comprised one integrated document, and the argument herein applies to both.

Statutes Involved

Sections 1006, 1007 and 1009 of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 75 Stat. 497, 49 U.S.C. §§ 1486, 1487, 1489, section 7(d) of the Administrative Procedure Act, 60 Stat. 241 (1946), 5 U.S.C. § 1006(d), and paragraphs (2) and (4) of Rule 25 of the Rules of the court below are set forth in Appendix A hereto (pp. 31-35 *infra*).

Statement

In 1956, the Civil Aeronautics Board (hereinafter referred to as the "Board") unanimously decided that "the public convenience and necessity [did] require additional air service between the Northeast and Florida", *New York-Florida Case*, 24 C.A.B. 94, 98, and a majority of the Board selected Northeast Airlines, Inc. (hereinafter referred to as "Northeast"), the smallest of the domestic trunk line air carriers, to provide that additional service. Northeast's certificate was amended so as to extend Northeast's operating authority to points south of New York, including Philadelphia, Washington and certain points in Florida. 24 C.A.B. at 120. However, because the extension of Northeast's routes was "in substantial measure changing the character of this carrier's operation" and doubt had been expressed concerning Northeast's ability to become an effective competitor in those markets south of New York, the Board did not in 1956 "make the extension permanent"; in the first instance Northeast's routes were extended for "5 years, after which we can again review the matter and consider further the requirements of the public convenience and necessity." 24 C.A.B. at 107.

Northeast invested years of hard and diligent work and many millions of dollars in the development of its services

in those markets south of New York and captured a very substantial share of the traffic there. Both directly by its services and indirectly by inspiring other carriers to competitive efforts, Northeast alleviated the service deficiencies which had existed in 1956. (See, e.g., Pet. App. 43a, 60a n. 13) [2] Having proved to be an effective competitor on its routes south of New York and thus demonstrated that the change in its character was appropriate, on April 3, 1961 Northeast duly applied for renewal of its authority south of New York. *New York-Florida Renewal Case*, C.A.B. Nos. 12285 et al. Because the Board has not yet finally determined that application, Northeast continues to serve its routes south of New York pursuant to section 9(b) of the Administrative Procedure Act.[3]

The Board's first two decisions in the *New York-Florida Renewal Case*, each of which was by the narrow margin of 3 to 2 and adverse to Northeast, were set aside on May 8,

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[2] For purposes of citations, the Petition for a Writ of Certiorari, the separately bound Appendix thereto, the proposed Amendment and Supplement to Petition, and the Appendix to the latter will be abbreviated, respectively, as Pet., Pet. App., Pet. Supp. and Pet. Supp. App. The appendix to this Brief which reprints record material (Appendix B *infra*) is paginated consecutively to petitioners' appendices, but page numbers in the appendix hereto are preceded by the symbol "A" (e.g., "A-216"). Certain materials which are not reproduced in any such appendix are cited herein by reference to the Record Appendix ("R.") which was before the court below and is part of the certified record filed in this Court.

[3] 5 U.S.C. § 1008(b). Section 9(b) provides that "in any case in which the licensee has, in accordance with the agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." Northeast is not, as petitioners' statement of the case suggests (Pet. 5), operating pursuant to a stay granted by the First Circuit; although at one time Board Order No. E-19910 was stayed *pendente lite* to prevent its becoming effective, that order was set aside on May 8, 1964. The most recent Board order purporting to deny Northeast's application (No. E-21550), pursuant to its express terms, would not have taken effect until 60 days after a final judgment of the First Circuit affirming that order (Pet. App. 161a).

1964 by the court below. *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 331 F.2d 579 (R. 2501-24). The court held that the reasons stated by the Board in denying Northeast's application were all "either irrelevant or inadequately developed", and therefore

> "the case must go back to the Board for further study followed by an explicit statement of the issue or issues actually decided and a statement of relevant bases for its decision supported by intelligible findings of fact. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' Secretary of Agriculture v. United States, 347 U.S. 645, 654, 74 S. Ct. 826, 832, 98 L. Ed. 1015 (1954), citing United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511, 55 S. Ct. 462, 79 L. Ed. 1023 (1935). *When we know what the Board decided and why, the time will be ripe to consider the legal sufficiency of the evidence* to support the Board's findings. In the meantime we shall retain our jurisdiction." 331 F.2d at 588-89. (Emphasis added.)

Neither the Board nor anyone else sought review of that May 8, 1964 decision.

More than six months later (on December 1, 1964), the Board issued its "Opinion on Remand" (Order No. E-21550), by the same 3-to-2 vote saying again that Northeast's application should be denied, and *sua sponte* transmitted copies of that order to the court below. (Pet. App. 48a, 162a) In supplying the "explicit statement of the issue . . . decided" which the May 8, 1964 decision of the court below had required, the Board shifted its reliance principally if not entirely to a newly articulated theory for ruling adversely to Northeast—that there was nothing to "warrant a conclusion that Northeast's Florida operations

over a longer period hold any reasonable prospect of success" (Pet. App. 32a). Although the Board had not afforded any party an opportunity to present additional evidence, in making the "statement of relevant bases" and the "intelligible findings of fact" to support its newly articulated theory (which the May 8, 1964 decision also required) the Board—apparently employing official notice—considered and in part relied upon new facts.[4]

Two weeks later Northeast, with the express permission of the court below, filed with the Board a petition which, in the words of section 7(d) of the Administrative Procedure Act, requested "an opportunity to show the contrary" of the numerous critical subsidiary findings in the Board's "Opinion on Remand" which were based upon matters as to which the Board purported to take official notice. That petition was denied by Board Order No. E-21872, by the same 3-to-2 vote, on March 5, 1965. Northeast, having petitioned for review of both Board orders (December 1 and March 5), filed in the court below a Motion for Order Directing Board To Receive Certain Further Evidence (pp. A-218 – A-219 *infra*), wherein Northeast prayed an opportunity to introduce rebuttal or explanatory evidence relating to certain specified subjects as to which the Board had taken official notice, so that the record would be complete for review on the merits. There was no oral argument on that motion, but Northeast filed a brief in support of it and Board counsel filed an extensive brief in opposition.

Only then did petitioners—who had been participating in the court below as *amici curiae* since, in 1963, they were

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[4] Unquestionably by December 1, 1964 the record was becoming, to say the least, somewhat stale. (See footnote 5 *infra*.) Moreover, the subjects as to which the Board apparently took official notice, which are described in more detail hereinafter (see p. 24 *infra*), were generally matters related to the so-called Florida market and Northeast's experience therein and were all directly and obviously related to the Board's newly articulated theory.

denied "at this stage" (Pet. App. 2a) leave formally to intervene by orders (Pet. App. 1a-4a) which this Court refused to review, 376 U.S. 931—ask leave to intervene. The motion for such leave filed by Eastern Air Lines, Inc. (hereinafter referred to as "Eastern") on April 2, 1965 was not submissible (pursuant to Rule 25(2) of the Rules of the court below (see pp. 34-35 *infra*)) until April 7, 1965 —5 days after the court below took Northeast's Motion under advisement. The similar motion of National Airlines Incorporated (hereinafter referred to as "National") was filed yet a week later and so was not submissible until April 14—one day after the decision granting Northeast's Motion was published. Neither Eastern nor National ever filed or tendered or sought leave to file any brief or memorandum with respect to Northeast's Motion.

On April 13, the court below (comprised of Chief Judge Aldrich and, by designation, Judge Maris of the Third Circuit and Judge Burger of the District of Columbia Circuit) granted Northeast's Motion. The court did not decide whether the Board had been required to look at up-to-date facts. Rather, the court found that the Board had elected to do so but, "having opened the door to new data", the Board had chosen to "look at one occupant of the room and then shut the door and draw conclusions as to the total assembly." (Pet. App. 195a-196a)

> "Section 7(d) did not require a hearing 'to decide whether a hearing is warranted.' The Board might, or might not, the propriety of which would have depended upon other considerations, have decided to hold a hearing to assist it in making up its mind whether to reopen for full further hearings. Alternatively, the Board might have decided, whether properly or not would again have depended upon considerations quite apart from section 7(d), to consider nothing beyond

the record as it originally existed. The Board rejected this last course, thereby escaping the criticism, legal or otherwise, that such a course might have evoked, and chose to look at some subsequent matters. It is to us crystal clear that *as soon as it elected to look at such matters it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed, but by no means created, by section 7(d) to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom.* Due process could permit no less.[6]

[6] To take a simple hypothetical, if the Board were to say, we deny your petition because we note that you lost money in October, the petitioner must be afforded the opportunity to show not only that it did not lose money in October, or that this was a bookkeeping matter read out of context, but also, for example, that it always lost money in October, so that the fact was of no significance, or that October proved to be the bottom of a curve and lost significance by virtue of subsequent events. . . ." (Emphasis added.)

Accordingly, the court below, exercising its power "to order further proceedings by the Board" (49 U.S.C. § 1486(d), see p. 32 *infra*), remanded the case for the Board to receive certain further evidence, meanwhile retaining its jurisdiction. The Board decided not to seek review of that April 13 decision.

Moreover, the Board elected voluntarily to go much farther than the April 13 order of the court below required: stressing the importance of "the public interest in the development of a sound national air transportation system" (Pet. App. 199a) and obviously mindful of the staleness of the record and the urging of various parties and two of its members that current facts could not be ignored,[5] on April

[5] The formal evidentiary record was closed on August 30, 1962 (R. 1950) and contains complete data only through the first quarter of 1962; some monthly reports containing traffic data were submitted

26, 1965 (in Order No. E-22084) the Board decided to reconsider the whole case *de novo* and on the basis of an up-to-date record.

> "[W]e have concluded that it is in the public interest to utilize the reopened proceeding for a complete review of the issues and pattern of service encompassed in the proceeding originally. . . . While it is true that other applicants in the proceeding did not choose to appeal the Board's denial of their applications, the public interest in the development of a sound national air transportation system can best be served by giving consideration to all qualified applicants who may wish to apply for the route. In short, since the case is again before the Board for hearing, we are of the opinion that all aspects of the public convenience and necessity issues presented in this case should be open for further consideration and that the Board should be in a position to consider those issues afresh in the light of the most recent data." (Pet. App. 199a)

Therefore the Board rescinded its prior orders adverse to Northeast and moved in the court below for dismissal of the pending judicial review proceedings.

On May 11 the court below granted the Board's motion

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thereafter, but even those were discontinued as of March 1963. (R. 2547) When the Board invited statements "of views or position with respect to the action which the Board should take and/or the procedures which it should follow" after the May 8, 1964 decision of the court below (R. 2528-29), although different parties stated different views, there seemed to be a consensus that somehow the Board should have before it more recent factual data (see, e.g., R. 2542-43, 2553-59, 2559-74). Even the Board's own Bureau of Economic Regulation urged that further factual submissions were appropriate. (R. 2544-47) As Vice Chairman Murphy and Member Minetti said, "The simple fact of the matter is that the march of events since the majority's first decision of August 15, 1963 has overtaken us". (Pet. App. 184a)

to remand and relinquished its jurisdiction in the six review proceedings then pending.[6] At the same time, because petitioners had ceased to be "precisely aligned with the Board" (Pet. App. 205a), the court below granted, for the purpose of their seeking review by this Court, petitioners' motions for leave to intervene. At petitioners' request, the court below delayed and then further postponed the effectiveness of its May 11 order, which finally took effect on June 4, 1965, after petitioners' requests for stay (and a petition for reconsideration) had been denied by the Board, by the court below, and by Mr. Justice Goldberg.

Argument

I. THE QUESTIONS THE PETITION CLAIMS TO PRESENT ARE NOT OF PRACTICAL SIGNIFICANCE IN THE CONTROVERSY IN WHICH THEY AROSE.

Petitioners' arguments have an "Alice in Wonderland" quality, for all of them are based on the wholly fallacious premise that the April 13 decision of the court below (rather than the April 26 Board order) set aside the prior Board order denying Northeast's application. In fact, as the court below carefully stated, and repeated, in its April 13

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[6] Board Order No. E-19910 (August 15, 1963), the first denial of Northeast's application, was the subject of the Petition for Review in the case known on the dockets of the court below as No. 6220, and No. 6233 was a proceeding for review of Board Order No. E-20073 (October 8, 1963), wherein the Board rejected Northeast's Petition for Reconsideration of Order No. E-19910; in its May 8, 1964 decision the court below retained jurisdiction in Nos. 6220 and 6233. Thereafter, Nos. 6445 and 6506 were initiated by Northeast's Petitions for Review of Board Orders Nos. E-21550 and E-21872, respectively, and Nos. 6507 and 6517 began when Petitions for Review of the latter two Board orders were brought by two labor unions whose members include Northeast employees—the Master Executive Council of Pilots of Northeast Airlines, Inc. and the International Association of Machinists.

opinion it was not "ruling on the merits" of the Board orders under review. (Pet. App. 192a, 193a n. 2) And certainly the Board fully understood that its orders had not been set aside, for it said so expressly both in its April 26 Order No. E-22084 (see Pet. App. 200a) and its May 24 Order No. E-22210[7] (denying stay of Order No. E-22084).

1. The April 13 order of the court below required only that certain further evidence be received, and, as the Board noted, it might have complied "with the Court's directive through some procedure short of evidentiary hearings" (Pet. App. 198a-199a). If the Board had merely undertaken the "further proceedings" directed by the court below, a petition for a writ of certiorari to review that April 13 order would have run afoul of this Court's well-established prohibition of interlocutory petitions for writ of certiorari,[8] and certainly no exceptional circumstances to justify interlocutory review could have been claimed—there would have been further Board proceedings and then

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[7] "In view of the fact that the Court of Appeals had not set aside the Board's order on remand (Order E-21550) and the order denying reconsideration (Order E-21872) and because the petitions for review of those orders were still technically pending in the court, the Board found it necessary to vacate Orders E-21550 and E-21872, 'subject to any necessary permission from the court'. Accordingly, it ordered rescission of the prior orders". (Order No. E-22210, p. 1) The purported rescission of Board Orders Nos. E-19910 and E-20073 by Order No. E-22084 is not relevant because those orders were set aside by the May 8, 1964 decision of the Court below and have not thereafter had any legal effect.

[8] The governing principle is well stated in *American Construction Co. v. Jacksonville*, 148 U.S. 372, 384:

> "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

extensive court proceedings before the court below even reached a decision on the merits.

But because, as the court below held, "the Board's [April 26] order [No. E-22084] goes beyond our April 13 order" (Pet. App. 206a; see Pet. Supp. App. 214aa) the review the Petition seeks is inappropriate not only because it would be unquestionably interlocutory but also because the questions the Petition claims to present are now moot and hypothetical.[9] The Board rescinded its orders which were being reviewed (Nos. E-21550 and E-21872), and consequently the court below relinquished its jurisdiction (Pet. App. 207a), so no judicial review proceeding is now pending and whether or not petitioners had a right to intervene is an academic inquiry. And, inasmuch as the Board has now reopened "the record completely" for "a complete review of the issues and pattern of service encompassed in the proceeding" and "for further consideration" of "all aspects of the public convenience and necessity issues presented . . . afresh in the light of the most recent data", whether or not the April 13 order of the court below was correct has no practical significance to the *New York-Florida Renewal Case*.[10]

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[9] As this Court held in *California* v. *San Pablo and T.R.R.*, 149 U.S. 308, 314,

> "the duty of this court, as of every judicial tribunal, is limited to determining the rights of persons or of property, which are actually controverted in the particular case before it. . . . But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles of law which cannot affect the result as to the thing in issue before it."

See *Mechling Barge Lines* v. *United States*, 368 U.S. 324; *Royal Cadillac Service, Inc.* v. *United States*, 317 U.S. 595; *Mills* v. *Green*, 159 U.S. 651; *United States ex rel. Norwegian Nitrogen Products Co., Inc.* v. *United States Tariff Commission*, 274 U.S. 106.

[10] The Board has scheduled a pre-hearing conference for July 8 and called for the submission on or before June 24 of the following:

> "(1) motions with respect to the scope of the issues or for consolidation of applications; (2) statements of position as to

2. Petitioners, who could not even claim harm by reason of the Board's merely complying with the April 13 order of the court below, really are complaining (see, e.g., Pet. 11) of the rescission of the Board's prior decisions adverse to Northeast. But that rescission was effected by the April 26 Board Order No. E-22084, not by any order of the court below, and petitioners, having failed to bring a statutory petition for review of Board Order No. E-22084 pursuant to section 1006 (49 U.S.C. § 1486, p. 31 *infra*), cannot ask this Court to review and overrule Board Order No. E-22084 indirectly. Congress in section 1006 conferred "exclusive jurisdiction" to review Board orders upon the courts of appeals, see *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364-65, and "this Court does not normally review orders of administrative agencies in the first instance [or] . . . take any action . . . which might foreclose the possibility of such review in the Court of Appeals", *Civil Aeronautics Board* v. *American Air Transport, Inc.*, 344 U.S. 4, 5. Indeed, review by this Court where no statutory petition for review of the administrative order has been filed in the court below could constitute an invalid exercise of original jurisdiction. See *United States* v. *Rice*, 327 U.S. 742, 747.

Moreover, Order No. E-22084 (in the words of the court below) was not "inappropriate" and was "action fully within the Board's discretion" (Pet. App. 206a). The "public convenience and necessity" is the standard for the

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use which should be made of existing record; (3) proposed statements of issues; (4) proposed stipulations; (5) requests for information; (6) statements of positions of parties; and (7) proposed procedural dates."

In connection with the Board's reopening, it is important that, as the government stated in its Memorandum on petitioners' Application for Stay (p. 2), since "the Board's order of April 26 (which was unanimous), two of the majority [in the Board's decisions adverse to Northeast—each of which was by the narrow margin of 3 to 2] have left the Board."

Board's consideration of applications for certificates pursuant to section 401(d) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(d)), and it is commonplace that an agency after remand of a case for correction of a legal error may consider afresh what course of action will best effectuate the legislative policy of the act it administers.

> "[W]hen a reviewing court finds a legal error in an administrative order, the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers provided the new order does not conflict with the reviewing court's mandate." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379.

Indeed, the agency is never foreclosed "from enforcing the legislative policy committed to its charge" and its "responsibility at all times is to measure applications by the [statutory] standard". *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. The agency should "deal with the problem afresh, performing the function delegated to it by Congress. . . . Only in that way could the legislative policy embodied in the Act be effectuated." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201. Accord, *Fly* v. *Heitmeyer*, 309 U.S. 146, 148; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 278. Indeed, an agency can reopen a proceeding despite the pendency of judicial review proceedings and despite the objections of a private party. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364; see, e.g., *Anchor Line Ltd.* v. *Federal Maritime Commission*, 299 F.2d 124, 125 (C.A. D.C. 1962); *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687, 692 (C.A. 5, 1964) *cert. denied*,

380 U.S. 908; *cf.*, e.g., *Roemer* v. *Simon*, 91 U.S. 149; *San Filippo* v. *Mulcahey*, 261 F.2d 260 (C.A. 1, 1958).

II. In any event, no issue raised by the Petition merits the attention of this Court.

A. *The so-called intervention issue.*

Almost a year and a half ago this Court refused to review the orders of the court below whereby petitioners were denied formal intervention and limited to participation as *amici curiae*. 376 U.S. 931. The present Petition is only a rehash of the arguments made a year and a half ago, for the relevant circumstances of this case have not changed significantly and petitioners made in the meantime no further efforts to intervene. Indeed, apparently petitioners' only reason for seeking again the writ denied in 1964 is their hope that they can ride on the coattails of two National Labor Relations Board cases in which this court has recently granted certiorari—*United Auto Workers* v. *Fafnir Bearing Co.*, 380 U.S. 950, and *United Auto Workers* v. *Scofield*, 379 U.S. 959. However, the present case is entirely different from those NLRB cases [11] and the supposed intervention question petitioners attempt to present—even if it were not moot (see pp. 11-12 *supra*)—would not merit the attention of this Court.

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[11] As this Brief demonstrates, for several reasons the present case really does not present any intervention question. Moreover, a proceeding to review a Civil Aeronautics Board order is different, for purposes of intervention, from an NLRB case, *first*, because an NLRB case normally involves only a few parties and a CAB case involves a multitude (40 in the present case) and, *second*, because in an NLRB case the agency has adjudicated private legal rights of the would-be intervenors guaranteed by the National Labor Relations Act and the issue before the court is whether to enforce an agency decision that those private rights had been infringed, whereas in a CAB case the issue is the public interest—the public convenience and necessity. (See pp. 17-21, 22-23 *infra*)

1. Petitioners' only new complaint with respect to intervention is that they were not heard on Northeast's Motion for Order Directing Board to Receive Certain Further Evidence, but neither of them made any timely attempt to be heard with respect to that Motion. On March 15, 1965, the court below issued an order establishing a procedural schedule which specified deadlines for "filing of any new petition for review, and motions" including "any motion for remand", and required "the filing of memorandum in opposition thereto, on or before April 2, 1965". (p. A-216 *infra*) That March 15 order indicates that copies of it were sent to counsel for both petitioners (Mr. Wait for Eastern and Mr. Rooney for National). (p. A-217 *infra*)

Although petitioners were thus fully informed of the deadline for opposition to Northeast's Motion, petitioners' efforts to gain intervention were timed so that their motions to intervene were not submissible until, respectively, 5 and 12 days after the court below had taken Northeast's Motion under advisement (see pp. 6-7 *supra*). Apparently petitioners were more interested in creating an issue to present to this Court than in being heard by the court below. If petitioners' delays were not calculatedly dilatory, at least they slept on their rights.

2. Although petitioners claim "due process injury" (Pet. 14) in connection with Northeast's Motion, they do not—and cannot—support their claims by pointing to any opportunity which they were denied or any meaningful way in which they were disadvantaged. There was no oral argument on Northeast's Motion (see Rule 25(4), p. 35 *infra*), and petitioners could have submitted memoranda in opposition to that Motion. Petitioners—who have filed in these same proceedings in the court below extensive briefs on the merits (84 pages) and memoranda on divers interlocutory matters (some 149 pages)—certainly knew how to be heard, if they wanted to be heard. Thus petitioners'

theory of "due process injury" is nothing more than the patently absurd proposition that the court below was required specially to invite petitioners to present argument which petitioners had knowingly failed to submit.

Nor have petitioners suggested that they could have presented to the court below any arguments which would have been new or different from those otherwise before the court. Petitioners do not claim that Board counsel's argument in the court below was in any way inadequate or deficient. And, even though petitioners made no attempt to present their contentions concerning Northeast's Motion to the court below, the court "did read and fully consider the extensive briefs [32 printed pages (R. 2762-93)] which these carriers had filed on this issue before the Board, and which were in the record presented to us". (Pet. App. 205a)

3. Implicit in petitioners' claims is the somewhat shocking assertion that, even though no private right of petitioners is involved in the present case, petitioners' private interest in getting rid of competition should supervene the public interest the administration of which Congress has entrusted to the Board. Indeed, the Petition itself, brought despite the Board's decision not to seek review of the April 13 order of the court below (Pet. App. 198a), constitutes an attempt of petitioners to substitute their judgment for the Board's and sacrifice the public interest in order to further their private interest in eliminating a competitor.[12]

Although petitioners undeniably have a competitive in-

[12] In 1964 the government argued that "separate and plenary review of [the intervention] . . . issue now would seemingly make for delay rather than for expedition." Memorandum for the Civil Aeronautics Board, Nos. 720, 766, October Term, 1963, p. 4. Today it is even clearer that the review petitioners seek will cause delay inimical to the public interest, for, in Order No. E-22084, the Board found that reopening will best serve the public interest and directed that the case be "processed on an expedited basis" (Pet. App. 201a). Nevertheless petitioners are industriously trying to erect litigious roadblocks to such expedition.

terest in preserving any decision adverse to Northeast, it is equally clear that they have no right to a denial of Northeast's application.[13] Indeed, the orders adverse to Northeast which were rescinded by the Board involved no legal rights—substantial or otherwise—of petitioners. Petitioners' rights to operate are not involved in any way in the present case; the Board orders under review did not grant or deny petitioners certificate authority or in any way modify their certificates. Any economic damage to petitioners which may result from renewal of Northeast's certificate will not constitute a modification or dilution of petitioners' certificate rights. *Delta Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 275 F.2d 632, 641 (C.A. D.C. 1959), *cert. denied sub nom., Trans World Airlines, Inc.* v. *Delta Air Lines, Inc.*, 362 U.S. 969.

> "[T]he damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue."

Tennessee Electric Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118, 140; see *Pennsylvania Railroad Co.* v. *Dillon*, 335 F.2d 292, 294-295 (C.A. D.C. 1964) *cert. denied sub. nom. American-Hawaiian Steamship Co.* v. *Dillon*, 379 U.S. 945.

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[13] The most recent decision of the District of Columbia Circuit which petitioners cite, *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F.2d 387 (C.A. D.C., 1962), illustrates that distinction and indicates that petitioners had no right to intervene in the present case. Standard Oil Company had brought an action for review of an oil import regulation of the Secretary of the Interior. Leave to intervene was granted to certain importers whose specified import quotas would be reduced if Standard were successful in the review proceeding, (304 F.2d at 392-94), but denied to Atlantic, whose allocation of foreign crude oil would be neither increased nor decreased by any result of the review proceeding and who would be affected only because Standard's success in the review proceeding would give Standard and some others "a potential, competitive advantage over Atlantic". (304 F.2d at 394) The position of petitioners, whose certificate authority is not involved and whose only interest is a competitive one, is like that of Atlantic.

Petitioners do not have, by virtue of either the Federal Aviation Act of 1958 or any Board order, any "right" to be free of competition, and their competitive interest clearly must be subordinate to the public interest. As this Court said in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 139,

> "their charters [do not] involve the grant of a monopoly or render competition illegal. The franchise . . . affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field."

Even if the Board entered a final decision denying Northeast's application and that decision were not set aside on judicial review, it could have no "res judicata" effect. Despite such a decision Northeast and/or any other carrier could the next day apply anew for authority competitive with petitioners, and if the public convenience and necessity so required (and the other statutory requisites were satisfied) the Board would be required to grant such an application. In light of the Board's certification of three or more carriers in dozens of much smaller markets and the continuing growth of the Florida market,[14] reversal of the Board's 1956 decision that "additional air service between the Northeast and Florida" was required

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[14] The Board has authorized service by three or more carriers in more than forty markets, almost all of which are far smaller than the New York-Miami market, including such "major" markets as Cleveland-Detroit (the New York-Miami market has almost 150 times as many passenger miles as the Cleveland-Detroit market) and, recently, the Seattle-Anchorage market. In the *Competitive Trunkline Service Investigation*, Orders E-20892 and E-20893, June 3, 1964, the Board unanimously refused to eliminate third carrier competition in considerably less dense markets in a proceeding specifically instituted to consider that issue. As to growth of the Florida market, see, e.g., Pet. App. 181a-182a.

by the public convenience and necessity seems, to say the least, extremely unlikely, and therefore, because the public interest requires it, petitioners will inevitably have competition.

4. Petitioners' argument that the court below denied their "right" to intervene is difficult to comprehend, because neither the denial nor the right ever existed. After petitioners' 1963 motions for leave to intervene had been denied "at this stage" (Pet. App. 2a), their April 1965 motions for leave to intervene—the first such motions in three of the cases in the court below (Nos. 6233, 6445 and 6506) and the first since remand in the fourth case—which were never denied, on May 11, 1965 were granted.[15]

Moreover, petitioners' claim that they at any time had a "right" to intervene is baseless. Certainly their participation as intervenors before the Board, which they stress (e.g., Pet. 14) gives them no right to intervene in judicial review proceedings, for it has been held repeatedly that no right to judicial review accrues as the result of intervention before the agency. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479; *Moffat Tunnel League* v. *United States*, 289 U.S. 113.[16] Nor is such a right granted

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[15] Petitioners do not—and cannot—contend that they were in any way prejudiced by not being parties between April 13 and May 11. And, because contemporaneously the proceedings in the court below were terminated, the fact that intervention was granted only for purposes of seeking appellate review cannot be harmful.

Petitioners' allegations (see Pet. Supp. 2, 3) that the court below somehow erred in its order of May 11 and/or its May 19 order by granting petitioners leave to intervene and also granting stays must be tongue-in-cheek, for petitioners' intervention and both stays of the effectiveness of the May 11 order were all requested by petitioners and petitioners were in no way impeded either in their applying to Mr. Justice Goldberg for a stay (inasmuch as 28 U.S.C. § 2101(f) permits such application in anticipation of the filing of a petition for writ of certiorari) or in their filing the Petition seeking review.

[16] The Board's Rules of Practice in Economic Proceedings specifically provide that grant of leave to intervene before the Board shall

by any statute. Indeed, although the Federal Aviation Act of 1958 adverts to the subject, it provides for intervention only in enforcement proceedings, and it indicates that even there intervention is to be discretionary and not as a matter of right.[17] And petitioners are certainly granted no right to intervene in the *Court of Appeals* by Rule 24(a)(2) of the "Federal Rules of Civil Procedure for the United States *District Courts*" (Emphasis added.) or by cases decided under Rule 24.

Moreover, even assuming for purposes of argument that this case were governed by Rule 24(a)(2)—which is a source to which courts of appeals may advert for appropriate analogy, see *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F.2d 334, 342 (C.A. 1, 1953)—that rule demands that two conditions be satisfied: that petitioners are or may be "bound by a judgment" entered by the court below, and that representation of petitioners' interests by existing parties "is or may be inadequate." Neither condition is satisfied in petitioners' case. Even if "bound" is not construed strictly, as referring to *res judicata*, see *Atlantic Refining Company* v. *Standard Oil Company*, 304 F.2d 387, 393 (C.A. D.C. 1962), the would-be intervenor is not "bound" unless some legally

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not "be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order . . . as will entitle it to judicial review of such order." 14 C.F.R. § 302.15(d).

[17] Section 1009, 49 U.S.C. § 1489, provides only that it is "lawful" for a court "to permit the intervention" of interested and affected parties. Certainly that section 1007 of the Federal Aviation Act of 1958 permits petitioners, as "private attorneys general", to sue to enjoin violations of certificate authority by competitors in no way implies that petitioners have a "right" to participate in all proceedings to determine the scope of such authority. Whether Northeast is flying in violation of its certificate has never been an issue before the court below. The only issue is the purely public issue of whether the renewal of Northeast's authority is in accordance with the "public convenience and necessity".

cognizable right or interest of his is involved in the proceeding, and petitioners could show no such right or interest (see pp. 17-20 *supra*). And, even if petitioners were somehow "bound", there remained unsatisfied the requirement of Rule 24(a)(2) that "the representation of the applicant's interest by existing parties is or may be inadequate." The only legitimate "interest" which petitioners can assert is the public interest (see pp. 3, 13-15 *supra*),[18] and Congress has entrusted to the Board the responsibility for representing the public interest. Unquestionably the Board, which has a large and competent legal staff, has worked vigorously to uphold its orders; and as soon as the adequacy of the Board's representation could be challenged—when the Board decided not to petition this Court for a writ of certiorari to review the April 13 order of the court below—petitioners were promptly permitted to intervene.

5. Inasmuch as petitioners had no right to intervene, the matter was within the discretion of the court below, *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F.2d 334, 342 (C.A. 1, 1953); 1 Davis, *Administrative Law*, § 8.11, at 571-72, and it is clear that the court below did not abuse its discretion. Typically, proceedings before the Board involve numerous parties who are granted leave to appear in order to make their interests known—not only airlines, but chambers of commerce, unions, municipalities, and the like. In the present

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[18] As this Court said in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 14, concerning the Communications Act of 1934, the Act

> "did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2), Congress gave the right of appeal to persons 'grieved or whose interests are adversely affected' by Commission action. . . . . *But these private litigants have standing only as representatives of the public interest.*" (Emphasis added.)

See *Federal Communications Commission* v. *Sanders*, 309 U.S. 470.

case, forty parties participated before the Board. The reviewing court, purely as a housekeeping matter, must consider whether the issues of the appeal will be muddled rather than clarified by allowing so many interests to participate as parties, particularly where, as here, the agency which promulgated the order under review "can take care of itself," and whether additional argument of private parties who seek to defend the agency's order "would be repetitious and cumulative." *Algonquin Gas Transmission Co.* v. *Federal Power Commission, supra,* at 342. The decision of the court below that petitioners might adequately express their views to the court by appearing as *amici curiae* was obviously reasonable and represented a fair accommodation in the circumstances. *Haleston Drug Stores, Inc.* v. *National Labor Relations Board,* 190 F.2d 1022 (C.A. 9, 1950), *cert. denied,* 342 U.S. 815.

Because the court below did not abuse its discretion, its order denying intervention is not appealable to this Court. *Brotherhood of Ry. Trainmen* v. *Baltimore & O. R. Co.,* 331 U.S. 519, 524-25. In any event, the appropriateness of the exercise of such discretion is hardly a question which warrants the attention of this Court.[19]

B. *The so-called official notice issue.*

As the court below noted, its April 13 decision was far from "novel" and in no way undermined or attacked the principle of official notice. (Pet. Supp. App. 214aa) Indeed,

[19] The fact that other courts in other circumstances have allowed intervention in proceedings reviewing Board orders indicates neither that the court below abused its discretion nor that there is any conflict. As petitioners concede, the question of whether intervention was proper was not raised or considered in those cases. Moreover, in all those cases the competing carrier which intervened was granted certificate authority by the Board order it sought to protect, and in none of those cases was intervention allowed to a carrier whose sole interest was to rid itself of competition. See also footnote 13 *supra.*

the legal principles involved are not open to debate; they have long been settled by a series of decisions of this Court, by statute, and even by a rule of the Board. The only issue really argued by the parties before the court below, and the only issue that court decided, was how those principles applied to the particular facts in the *New York-Florida Renewal Case*—in other words, what use the Board had actually made of officially noticed matters. The decision of the court below was thus merely an application of established rules of law to particular facts, and therefore it does not merit the attention of this Court. See *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440.

1. In its December 1, 1964 Order No. E-21550, the Board took official notice as to the following facts, among others: Northeast's operating results during 1963 and the first quarter of 1964 (Pet. App. 21a-23a, 32a), the scope of Northeast's Florida operations during the same period (Pet. App. 21a-22a), the impact of Order E-19910 upon Northeast's financial experience (Pet. App. 22a), Northeast's traffic and participation in the New York-Miami and Philadelphia-Miami markets in 1963 (Pet. App. 22a), Toolco-Northeast transactions (Pet. App. 23a-24a), disposition of Northeast's complaint alleging violation of section 411 of the Federal Aviation Act by Eastern (Pet. App. 27a), total on-line origin and destination traffic (local and connecting) in 1963 (Pet. App. 31a-32a), data on actual operations during the 1962-1963 winter season (Pet. App. 34a-35a), Florida schedules as of February 15, 1963 (Pet. App. 39a), on-line origin and destination passengers for 1963 for selected city pairs (Pet. App. 119a-122a), and selected Northeast financial data for 1963, 12 months ended March 31, 1964, and first quarter of 1964 (Pet. App. 123a).[20]

[20] Although Appendix C to Order No. E-21550 is captioned "financial data for Northeast and Eastern", for some reason, no data for Eastern is presented. (Pet. App. 132a)

Northeast timely requested of the Board, and then by its Motion for Order Directing Board To Receive Certain Further Evidence (pp. A-218 – A-219 *infra*) sought in the court below, the opportunity to present evidence on those subjects in rebuttal or explanation. For example, the Board looked at statistics concerning Northeast's operating experience under the shadow of its 1963 death sentence—that is, statistics for the period between the Board's original decision denying Northeast's application and the reversal thereof by the court below—which, as might be expected, showed large losses. In that connection, Northeast claimed the right to present evidence that its operating experience during that period was unrepresentative, including statistics showing that Northeast's fortunes had been dramatically reversed by the May 8, 1964 decision of the court below and it operated at a profit (after subsidy for New England service) thereafter.

2. There can be no doubt that Northeast was entitled to the opportunity it requested to present evidence in rebuttal or explanation. Thirty years ago, in a case which (as the record therein discloses) is strikingly similar to the present case, this Court held unanimously that a utilities commission had denied a utility company procedural due process: Some eight months after a rate-determination case had been tried and submitted to the commission for decision and on the eve of its decision, the commission, by an ex parte order, without the company's knowledge, directed that the annual reports of the company for the years 1928-31 be made a part of the record. The company objected and sought a rehearing to introduce its annual report for 1932, but the rehearing was denied. This Court held "that the fundamentals of a fair hearing were not conceded to the Company. Opportunity did not exist to supplement or explain the annual reports". *West Ohio*

Gas Co. v. *Public Utilities Commission*, 294 U.S. 63, 70.[21] See also *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 93:

> "[T]he Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights to make its defense. In no other way can it test the sufficiency of the facts to support the finding."

And in *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292, this Court held that the due process clause was violated when a state utility commission, after resorting to tax records in communities where a utility held real estate as price indices to adjust an eight-year-old valuation of the utility's property, denied the utility's request for a rehearing in order to rebut the

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[21] None of the cases cited by petitioners impairs the authority of *West Ohio Gas Co.* and related decisions. In *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 561-62, this Court found both that the data officially noticed was "immaterial" and that the company was not prejudiced because "no contention is made that the Company could have . . . explained away its effect", so the company's argument in that case was asserting a technicality which would "trivialize" due process. In *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 528, this Court noted that it would have been error for the Commission to consider evidence "which appellees were given no opportunity to meet", but such opportunity had been afforded, because each party had full opportunity to cross-examine and present evidence. And in *American Trucking Association* v. *Frisco Transport. Co.*, 358 U.S. 133, 144, this Court was careful to point out that "this is not a case like *Ohio Bell Tel. Co.* v. *Public Utilities Com.*, 301 U.S. 292, or *United States* v. *Abilene & S. R. Co.*, 265 U.S. 274, where the 'facts' officially noticed were in doubt or controverted or were discussed for the first time in the final decision of the Commission."

data noticed by the commission and offer its own evidence of actual value.

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (301 U.S. at 304-05).

The right to a fair hearing was codified in Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 1006(d) (p. 34 *infra*), which, after specifying what will comprise "the exclusive record for decision", directs that if "any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."[22]

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[22] Section 7(d) is clearly applicable to the *New York-Florida Renewal Case*, 5 U.S.C. § 1004; 49 U.S.C. § 1371(c); see *Rios & Co.* v. *United States*, 341 U.S. 907, reversing *per curiam*, 96 F. Supp.

3. The only issue debated in the court below was (in the words of the government's Memorandum on petitioners' Application for Stay (p. 3)) a "dispute as to the precise weight given to the more recent reports", and the court below, considering the statements of the Board and its orders, found that, as the Board itself acknowledged, "before reaching a final conclusion" on remand the Board looked to data more recent than the close of the record. (Pet. App. 169a) As that same Memorandum states, such a dispute clearly does not present a question for this Court.

Petitioners' arguments that the Board's decision did not "rest" on officially noticed matters and that there was no showing that Northeast was prejudiced are simply a repetition—under different labels—of the same dispute; in other words, petitioners simply disagree with the court's decision as to how the Board used extra-record matter Moreover, the court below was correct: it is obvious that (as the court held) the Board in its "Opinion on Remand" rested "upon the old record plus 'reports filed by the carriers since the formal closing of the evidentiary record' " and based its ultimate "conclusion upon operating figures through the first quarter of 1964" (Pet. App. 193a, quoting Pet. App. 8a) and the Board "looked at . . . 'more recent operating results and traffic statistics' " (Pet. App. 193a). (See also p. 7 *supra*.) Even ignoring the obvious inter-relationship between the officially noticed matters and the Board's newly articulated basis of decision (see pp. 5-6 *supra*), substantial prejudice to Northeast is implicit in the fact that (as the court below found) the

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452 (W.D. Mo., 1950); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And Rule 24(m)(2) of the Board's Rules of Practice in Economic Proceedings, 14 C.F.R. 302.24(m)(2), expressly provides that "taking of official notice shall be subject to the rights granted to any party or intervener to the proceeding under Section 7(d) of the Administrative Procedure Act."

record upon which the Board decided on remand adversely to Northeast's application was incomplete in that it contained the officially noticed data and did not contain the evidence in rebuttal and explanation which Northeast sought to present.[23]

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[23] As the *Final Report of the Attorney General's Committee on Administrative Procedure* states (at pp. 72-73), "the special nature of the administrative process does not mean that agencies should be free to roam at will through their files, or elsewhere, after the hearing is closed. . . . [When official notice is taken the parties are entitled to an opportunity] not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained." Accord, e.g., *Petition of N.Y. Water Service Corp.*, 283 N.Y. 23; *State* v. *Duranleau*, 99 N.H. 30, 32, 104 A.2d 519 (1954) ("the defendant had [the right to an] . . . opportunity to dispute the applicability or validity of the ordinance in this proceeding").

Conclusion

Thus the questions the petition purports to present—far from being, as petitioners claim (Pet. 28), "of widespread importance to the administrative process"—at most involved the correct application of well-settled principles of law to the particular facts of this case and, indeed, have lost all practical significance even in the controversy from which they arose, because the Board, in the public interest, has undertaken a complete reopening of the administrative case and the review proceedings in the court below have been terminated. Accordingly, for the reasons stated, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

FEDERAL AVIATION ACT OF 1958:

SECTION 1006 (72 STAT. 795 (1958) AS AMENDED 75 STAT. 497 (1961)) (49 U.S.C. § 1486):

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeal of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in Section 2112 of Title 28.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive juris-

diction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of fact by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

SECTION 1007 (72 STAT. 796 (1958)) (49 U.S.C. § 1487):

(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the

enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this chapter or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

SECTION 1009 (72 STAT. 796 (1958)) (49 U.S.C. § 1489):

In any proceeding for the enforcement of the provisions of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, whether such proceedings be instituted before the Board or be begun originally in any court of the United States, it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the

matter under consideration; and inquiries, investigations, orders and decrees may be made with reference to all such parties in the same manner, to the same extent, and subject to the same provisions of law as they may be made with respect to the persons primarily concerned.

ADMINISTRATIVE PROCEDURE ACT (60 Stat. 241 (1946)):
SECTION 7(d) (5 U.S.C. § 1006(d)):

(d) RECORD. — The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT:

RULE 25 — MOTIONS:

. . .

(2) RETURN DAY—OPPOSITION—SUBMISSION. The return day of the motion shall be the third day (seventh day in cases from Puerto Rico) after the date of service unless the movant serves and files a notice fixing a later return day. (Sundays and holidays shall be excluded in the calculation of time under this rule.) The opposing counsel may, before 10 o'clock in the morning of the return day or within any extension of time made by the court or a judge thereof, file four

copies of a memorandum in opposition to the motion, with proof of service; the motion will then stand submitted, unless oral argument is directed by the court.

. . .

(4) No Oral Argument Ordinarily. There will be no oral argument upon motions, except by direction of the court in which event the clerk will notify counsel of the time set for hearing.

. . .

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6220.

NORTHEAST AIRLINES, INC.,
PETITIONER,
v.
CIVIL AERONAUTICS BOARD,
RESPONDENT.

No. 6233.

SAME
v.
SAME

No. 6445.

SAME
v.
SAME

ORDER OF COURT

March 15, 1965

Upon consideration of letters from counsel for both parties dated March 12, 1965, the following schedule is hereby fixed:

The filing of any new petition for review, and motions referred to in letter from counsel for petitioner, and memoranda in support thereof, if any, on or before March 26, 1965, with proof of delivery of any motion for remand;

The filing of memorandum in opposition thereto, on or before April 2, 1965;

Brief for petitioner and record appendix thereto, on or before April 30, 1965; and

Brief for respondent, and record appendix thereto, if any, on or before May 28, 1965.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk

[cc: Messrs. Peterson and Ozment.
Courtesy cc. Messrs. Rooney, Wait and Hanify.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 6220
6233
6445
6506

NORTHEAST AIRLINES, INC.,
PETITIONER,
v.
CIVIL AERONAUTICS BOARD,
RESPONDENT.

MOTION FOR ORDER DIRECTING BOARD TO RECEIVE CERTAIN FURTHER EVIDENCE

Northeast Airlines, Inc. (hereinafter referred to as "Northeast"), the petitioner in each of the above-identified cases, respectfully prays that this Court enter an order

(a) remanding this matter to the Civil Aeronautics Board (hereinafter referred to as the "Board") for further proceedings not inconsistent with this Court's Opinion of May 8, 1964;

(b) directing the Board to afford an opportunity to petitioner to introduce evidence tending to show the contrary of those subsidiary findings in Board Order No. E-21550 which are based on official notice of factual data, including evidence relating to each of the following subjects:

(1) the financial results of Northeast's operations from and after August 30, 1962;

(2) Northeast's operations to and from Florida since August 30, 1962;

(3) the impact of Board Orders Nos. E-19910 and E-20073 upon the financial results of Northeast's operations;

(4) Northeast's relations with Hughes Tool Company;

(5) Northeast's complaint alleging violation by Eastern of Section 411 of the Federal Aviation Act;

(6) operational experience (including on-line origin and destination traffic passenger load factors) of National, Eas ern and Northeast since August 30, 1962; and

(7) Florida schedules of Northeast, Eastern and National from and after February 15, 1962; and

(c) granting such other and further relief as to this Court may seem proper.

Said petitioner respectfully submits that, for the reasons stated in the Brief filed herewith, the relief prayed herein is necessary to supplement and enforce the Decree of this Court entered May 8, 1964 and in aid of the jurisdiction of this Court to review Board Orders Nos. E-19910, E-20073, E-21550 and E-21872.

By its attorneys,

(s) HENRY E. FOLEY

(s) CLARENCE I. PETERSON

(s) LOYD M. STARRETT

10 Post Office Square

Boston, Massachusetts 02109